U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 04 October 2005

IN THE MATTER OF:

BOBBY D. MANN,
Claimant,

v. Case No.: 2004-BLA-164

TURNER BROTHERS, INC.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES: Bobby D. Mann, *pro se*

Scott White, Esq.
For the Employer

BEFORE: Thomas M. Burke
Associate Chief Administrative Law Judge

DECISION AND ORDER DENYING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. § 901 *et seq.* ("Act"), and the implementing regulations thereunder at 20 C.F.R. Parts 718 and 725 (2001). A hearing was held in McAlester, Oklahoma on April 14, 2005. The decision in this matter is based upon the testimony of Claimant and his wife, Claudette, at the hearing, all documentary evidence admitted into the record at the hearing, and the post-hearing arguments of the parties. The documentary evidence admitted at the hearing includes *Director's Exhibits* (*Dx.*) 1-148 and *Claimant's Exhibits* (*Cx.*) 1-2. *Employer's Exhibits (Ex.)* 1 (records from St. Edward Mercy Medical Center) and 2 (deposition of Dr. Renn) were discussed at the hearing, but neither exhibit was formally offered or admitted. As a result, by *Order* dated June 24, 2005, *Employer's Exhibits* 1 and 2 were formally admitted as evidence in this claim.

Overview of the Black Lung Benefits Program

The Black Lung Benefits Act is designed to compensate those miners who have acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Those miners who have worked in or around mines and have inhaled coal mine dust over a period of time, may contract black lung disease. This disease may eventually render the miner totally disabled or contribute to his death.

Procedural History

I
First Claim

The miner filed his first claim for benefits on September 23, 1974. *Dx.* 31. The claim was forwarded to the Department of Labor (Department) for review but, by letter dated April 16, 1979, the claim was denied based on insufficient years of coal mine employment as well as a failure to demonstrate any element of entitlement. Again, on August 14, 1979, the claim was denied on the same grounds. By letter dated October 21, 1981, Claimant's representative inquired as to the status of the claim. In a letter dated November 5, 1981, the claims examiner stated:

> Mr. Mann's claim is now closed. It may not now be reopened since it was denied over two years ago. All appeal rights have been run.

Dx. 31.

II
Second Claim

A second claim was filed on May 4, 1983. *Dx.* 30. By proposed decision dated September 29, 1983, the district director found that Claimant established 10.6 years of coal mine employment, but benefits were denied for failure to establish any element of entitlement. By letter dated November 4, 1983, Claimant requested a hearing. It appears that an informal conference was held where the district director denied benefits and Claimant did not subsequently request a hearing.

III
Third Claim

The miner submitted a claim for the third time on November 17, 1986. *Dx.* 1. On February 13, 1987, the district director proposed to deny the claim for failure to demonstrate any element of entitlement. *Dx.* 15. By letter submitted on April 16, 1987, Claimant requested that the record be held open for submission of additional evidence. *Dx.* 16.

On April 20, 2987, the district director advised Claimant that he must specifically request a hearing within 30 days of the date the claim was denied, or he could submit additional evidence

for reconsideration within one year of the denial. *Dx.* 20. Later, in response to a status inquiry by Employer, the district director stated the following:

> Mr. Mann has appealed the denial of his claim. It will be prepared for formal hearing and forwarded to the Office of Administrative Law Judges.

Dx. 26. On August 5, 1987, the claim was referred to this Office for adjudication. *Dx.* 32.

Initial referral to this Office

Without a hearing, on March 17, 1988, an administrative law judge issued a *Decision and Order – Rejection of Claim* on grounds that Claimant did not establish a "material change in conditions" since the denial of his April 12, 1983 claim as required by 20 C.F.R. § 725.309. *Dx.* 33. Claimant appealed by letter dated April 8, 1988. *Dx.* 34. On October 7, 1991, the Benefits Review Board (Board) remanded the claim for a formal hearing in accordance with *Lukman v. Director, OWCP*, 896 F.2d 248 (10th Cir. 1990). *Dx.* 36.

Decision by Administrative Law Judge Amery

A hearing was conducted by Administrative Law Judge Robert S. Amery on July 19, 1994. *Dx.* 40. He issued a *Decision and Order – Rejection of Claim* on February 16, 1995 after finding that Claimant established the presence of coal workers' pneumoconiosis through medical opinion evidence, but failed to demonstrate that he was totally disabled. *Dx.* 46. Judge Amery also credited Claimant with 15 years of coal mine employment after finding that he started work in the mines at the age of 18 years and stopped working in 1985. Judge Amery further noted that Claimant last worked as a supervisor where he was on a "dead run" for 13 hours a day and had to supervise men and do lifting. Finally, Judge Amery found that Claimant had smoked cigarettes for 40 years, but reduced his habit from one pack per day to one-half a pack per day around 1983.

Appeal to the Benefits Review Board

By letter dated March 13, 1985, Claimant appealed Judge's Amery's *Decision*. *Dx.* 47. By *Decision and Order* dated February 15, 1996, the Board affirmed Judge Amery's findings regarding the length of coal mine employment and presence of coal workers' pneumoconiosis as unchallenged on appeal. *Dx.* 49. The Board also affirmed Judge Amery's finding that Claimant did not establish total disability.

Appeal to the Tenth Circuit Court of Appeals

Claimant appealed the Board's *Decision* to the Tenth Circuit Court of Appeals by letter dated March 11, 1996. *Dx.* 50. On February 11, 1997, the circuit court issued a decision in *Mann v. Director, OWCP*, 107 F.3d 21 (10th Cir. 1997) (unpub.), wherein it affirmed the Board's *Decision. Dx.* 52.

By letter dated March 17, 1997, Claimant stated that he wanted to appeal the decision of the Tenth Circuit. *Dx.* 55. No further action was taken with regard to Claimant's request at the time.

Petition for modification of Tenth Circuit's denial of benefits

On March 9, 1998, Claimant filed a claim form for the fourth time. *Dx.* 56. The district director proposed to deny benefits on July 24, 1998 for failure to demonstrate any element of entitlement. By letter dated August 11, 1998, Claimant requested a hearing. *Dx.* 64.

On July 9, 1999, the district director acknowledged that the Department had taken no action with regard to Claimant's appeal request. As a result, he concluded that Claimant's letters would constitute petitions for modification. *Dx.* 70-73.

Award of benefits by the district director

An informal conference was convened and, by *Memorandum of Conference and Stipulation* dated September 5, 2000, the district director concluded that Claimant had presented evidence sufficient to establish entitlement to benefits. *Dx.* 81. Employer requested a hearing by letter dated September 15, 2000. *Dx.* 82. The claim was referred to this Office for adjudication on March 9, 2001. *Dx.* 85.

Decision by Administrative Law Judge Pamela Lakes Wood

On December 10, 2002, Administrative Law Judge Pamela Lakes Wood issued a *Decision and Order Denying Benefits*. *Dx.* 100. Judge Wood concluded that, although the evidence demonstrated that the miner suffered from a totally disabling respiratory impairment, the evidence did not support a finding that he suffered from simple or complicated coal workers' pneumoconiosis and benefits were denied.

Appeal to the Benefits Review Board

Claimant appealed Judge Wood's denial of benefits and, by *Decision and Order* dated September 24, 2003, the Board affirmed the denial. *Dx.* 106. By undated letter received on October 7, 2003, Claimant expressed his disagreement with the Board's *Decision.* *Dx.* 108. Again, by letter received October 15, 2003, Claimant requested reconsideration and asserted that it was "error for Judge Wood to allow the employer to re-open the issue of the existence of pneumoconiosis." *Dx.* 109.

On January 22, 2004, the Board issued an *Order on Motion for Reconsideration* wherein it denied Claimant's motion for reconsideration. *Dx.* 112.

Petition for modification

On February 2, 2004, Claimant filed a petition for modification. *Dx.* 113. On May 12, 2004, the district director requested that Claimant specify the mistake in a determination of fact made by Judge Wood or the Board. *Dx.* 121.

On August 11, 2004, the district director issued a *Proposed Decision and Order Denying Request for Modification*. *Dx.* 138. By letter dated August 25, 2004, Claimant requested a hearing. *Dx.* 143.

Referral to this Office for Adjudication

Based on the miner's hearing request, the claim was referred to this Office for adjudication on September 24, 2004. *Dx.* 146.

The Standard for Entitlement

Because this claim was filed after April 1, 1980, it is governed by the regulations at 20 C.F.R. Part 718.[1] Under Part 718, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis; (2) arising out of coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986)(en banc); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986)(en banc). Failure to establish any one these elements precludes entitlement to benefits.

Issues Presented for Adjudication and Stipulations

The issues listed as contested on the CM-1025 include whether Claimant has demonstrated an element of entitlement previously adjudicated against him in the prior claim as required by 20 C.F.R. § 725.309 and, if so, (1) whether the miner suffers from pneumoconiosis, (2) arising out of coal mine employment, (3) whether he is totally disabled, and (4) whether the miner's total disability was due to pneumoconiosis. *Dx.* 148.

Employer withdrew the issues of whether Claimant (1) worked as a "miner," and (2) last worked for the named employer for a period of one year. *Tr.* at 7. Employer further stated that it would accept the district director's calculation of slightly over 10 years of coal mine employment. *Tr.* at 9; *Dx.* 62. Claimant alleges that he worked for 25 years in the coal mines. *Tr.* at 30.

[1] As the miner last engaged in coal mine employment in the State of Oklahoma, appellate jurisdiction of this matter lies with the Tenth Circuit Court of Appeals. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc).

Timeliness of the claim

Initially, it is noted that Employer's counsel signed a stipulations sheet at the informal conference agreeing that this claim was timely filed. *Dx.* 81. As a result, when the claim was referred to this Office for adjudication, the list of contested issues on the CM-1025 did not include timeliness. *Dx.* 148. At the hearing, Employer raised timeliness as an issue. The regulations at 20 C.F.R. § 725.463(a) provide that "[e]xcept as otherwise provided in this section, the hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. § 725.463(a) (2004). Further, the regulations provide that the undersigned Administrative Law Judge "may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director." 20 C.F.R. § 725.463(b) (2004). This issue was readily ascertainable by Employer and, indeed, Employer stipulated to the timeliness of this claim at the district director's level. However, because Employer's motion to amend the CM-1025 at the hearing was granted, the issue of timeliness shall be considered.

This claim arises in the Tenth Circuit Court of Appeals and, in *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996), the court held that a subsequent claim based on a newly submitted medical opinion of total disability due to pneumoconiosis does not violate the three year statute of limitations:

> When a doctor determines that a miner is totally disabled due to pneumoconiosis, the miner must bring a claim within three years of when he becomes aware or should have become aware of the determination. However, a final finding by the Office of Workers' Compensation Programs adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations.
>
> . . .
>
> Instead, Section 309 suggests that a claimant should not be barred from bringing a duplicate claim when his or her first claim was premature because the claimant's conditions had not yet progressed to the point where the claimant met the Act's definition of total disability due to pneumoconiosis.

Based on the foregoing, it must be determined whether the miner's third claim, filed on November 17, 1986, is timely. As previously noted, the Board and Tenth Circuit affirmed Judge Amery's denial of benefits based on Claimant's failure to demonstrate that he was totally disabled due to pneumoconiosis with the medical evidence submitted at the time. While a few medical opinions pre-dating the November 1986 claim contained diagnoses of total disability due to pneumoconiosis, it is evident that the conclusions were premature. Consequently, the limitations period contained at 20 C.F.R. § 725.308 has not commenced to run and this claim the pending November 1986 claim was timely filed.

Length of coal mine employment

The district director calculated Claimant's length of employment in the mines as slightly over 10 years and Employer agrees with this calculation. The miner, however, alleges 15 to 19 years of coal mine employment.

Judge Amery concluded that Claimant demonstrated 15 years of coal mine employment, where he started working at the age of 18 years and stopped in 1985. Judge Wood adopted this finding in her subsequent *Decision.* Judge Amery stated the following:

> The Claimant testified that he had about 20 years of coal mine employment and that is what he alleged on his most recent claim form. *Dx.* 1. On previous claim forms filed in 1974 and 1983 he alleged 12 years. *Dx.* 30, 31. His employment history forms claim about 19 years. *Dx.* 2, 30, 31. His Social Security records show about 60 quarters of coverage or 15 years. *Dx.* 3; *Ex.* 26. The Claimant has submitted W-2 forms, payroll records and some income tax 1040 records for the years 1976 to 1985. *Dx.* 4; *Cx.* 1. In a letter dated June 9, 1983 a superintendent of the Employer, Turner Brothers, Inc., verified the Claimant's employment there beginning on June 30, 1980. *Dx.* 30. Also, coal mine employment affidavits from Clifford Smith and Judson Conley Scott confirm the Claimant's coal mine employment for 4 and 5 years respectively. *Dx.* 30, 31. Upon consideration of all this evidence, I find that the Claimant has at least 15 years of coal mine employment.

Judge Amery's finding was affirmed by the Board and Tenth Circuit as unchallenged on appeal.

On modification, Claimant submitted a "Surface Mine Supervisor's Certificate" dated March 8, 1982 from the State of Oklahoma Mining Board wherein it provides that, at the age of 49 years, Claimant had 20 years of experience and has "successfully completed the requirements of a supervisor's certificate." *Cx.* 1. The method of calculating the years of mining experience listed on the Certificate is unknown and, standing alone, cannot support a determination of the length of coal mine employment under the Act.

However, at the hearing, Claimant credibly recalled that he began working as a miner alongside his father at the age of 14 years. *Tr.* at 13-14. Claimant testified as follows:

Judge Burke: Who did you work for when you were 14?

Claimant: Morris Jones.

Judge Burke: Morris Jones, Now, were you still in school then?

Claimant: No, I never did go to school.

Judge Burke: Never went to school?

Claimant: I went to second grade.

Judge Burke: Second.

Claimant: That's why I went to work in the mines, because I wouldn't go to school.

Judge Burke: Were you working full time, then, when you were 14?

Claimant: I was working 60 hours a week. My dad and Morris Jones and Clifford Smith all worked there, and they dug about a tonnage and they hired me 50 cents an hour.

Judge Burke: When you started working when you were 14 years old, how long did you work then? How long did you continue to work? How many years did you work as a miner at that time?

Claimant: I worked till I was, I think, 18. I went to work at Poteau in the union mine.

. . .

Judge Burke: Okay. So you worked continually from the time you were 14 until the time you were 18?

Claimant: Yeah. They paid me cash. They paid me cash money.

Judge Burke: So there was no Social Security money paid?

Claimant: Not then. They was working by the tonnage and they just paid me by the hour. I was just a mule, I called it.

Tr. at 14-15. Claimant testified that he "had to be 18 before (he) could go to work for the union." *Tr.* at 16.

After observing Claimant during his hearing testimony, it is determined that he is credible and his testimony constitutes a sufficient basis upon which to add four years of coal mine employment to the 15 years of employment found by Judge Amery. Thus, Claimant has demonstrated 19 years of coal mine employment.

Threshold requirement of 20 C.F.R. § 725.309

Pursuant to 20 C.F.R. § 725.309(d), the record may be reviewed *de novo* with regard to all elements of entitlement in a subsequent claim only if the new evidence submitted in connection with the subsequent claim establishes a "material change in conditions."

Here, the Tenth Circuit upheld Judge Amery's finding that the threshold requirements of § 725.309 were met. In particular, the miner's second claim was denied for failure to demonstrate any element of entitlement. However, in the third claim Judge Amery found that the miner demonstrated the presence of coal workers' pneumoconiosis. On modification, Judge Wood concluded that coal workers' pneumoconiosis was not present, but that the miner did suffer from a totally disabling respiratory impairment. As a result, the miner's third claim is viable and must be reviewed *de novo* on modification to determine whether there was a mistake in a determination of fact in Judge Wood's 2002 *Decision* or whether the miner's condition has changed since the time of her *Decision* such that he is entitled to benefits.

Testimony at the Hearing

Bobby Mann

1. Claimant testified that he was 71 years old at the time of the hearing. *Tr.* at 13. Claimant did not attend school past the second grade. *Tr.* at 14.

2. He recalled that he started working in the mines at the age of 14 years. *Tr.* at 14. At the time, he worked for Morris Jones. *Tr.* at 14. Claimant worked for Mr. Jones as a "mule" for 60 hours a week until he turned the age of 18 years. *Tr.* at 14. He stated that he was required to be 18 years old before he could go to work in a "union mine." *Tr.* at 14. During the time he worked for Mr. Jones, Claimant was paid $.50 an hour in cash; no earnings were reported for Social Security purposes. *Tr.* at 15.

3. When he turned 18 years old, Claimant went to work for Poteau, which was a "union mine." *Tr.* at 14. He worked at the Poteau mine for about seven years. *Tr.* at 16-17.

4. Except for nine months of mining with Alpine Coal in 1985, Claimant last worked in the mining industry for Turner Brothers, which was a strip mine. *Tr.* at 17-18 and 22.

5. With regard to his health, Claimant states that he cannot breathe. *Tr.* at 20. He testified that he had to stop three or four times while coming into the courthouse for the hearing and he fell once. *Tr.* at 21. Claimant uses oxygen during the night and inhalers during the day. *Tr.* at 21.

6. When asked about his smoking history, Claimant recalled that he did not smoke when he worked underground, but that at night he would "smoke a cigarette." *Tr.* at 24. He states that he has not smoked a cigarette in three years, or since March 2002 after he suffered from pneumonia. *Tr.* at 24.

Claudette Mann

1. Mrs. Mann testified that she married Claimant in 1974. *Tr.* at 25.

2. Mrs. Mann unsuccessfully tried to obtain records or witness statements regarding her husband's coal mining employment when he was 14 to 18 years of age, but co-workers and family members have passed away or records have been destroyed. *Tr.* at 27.

3. Mrs. Mann presented a certificate from the State of Oklahoma in 1983 stating that the miner had 20 years of coal mining experience. *Tr.* at 30. She could not state whether this certificate included the years Claimant worked for Mr. Jones. *Tr.* at 29-30.

4. With regard to her husband's health, Mrs. Mann testified as follows:

> His health's bad. He stays on oxygen. He is usually in the bed 12 to 13 hours a day. He goes to bed early. He always uses his oxygen. He's got the electric breather that put the medicine in it and it kind of bubbles and he breathes with that.

Tr. at 32. Mrs. Mann stated that Claimant has used oxygen for the past one and one-half years. *Tr.* at 33. He uses the "electric breather," *i.e.* vaporizer, five to six times a day. *Tr.* at 36. She also states that Claimant takes cough medicine with codeine as well as a medication for dizziness. *Tr.* at 42.

Existence of Pneumoconiosis and its Etiology

Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

> (a) For the purpose of the Act, "pneumoconiosis" means a "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> > (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. The definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
> >
> > (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited

> to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (2001). Moreover, the regulations at 20 C.F.R. § 718.203(b) (2001) provide that, if a miner suffers from pneumoconiosis and has engaged in coal mine employment for ten years or more, as in this case, there is a rebuttable presumption that the pneumoconiosis arose out of such employment.

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a) (2001).[3]

When weighing chest x-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) (2001) require that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."[4] In this vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). The summary of chest x-ray evidence set forth by Judge Wood in her 2002 *Decision* is incorporated by reference. The following chest roentgenogram evidence has been generated and submitted subsequent to her *Decision*:[5]

---

[3] There is no autopsy or biopsy evidence in this record and the presumptions contained at §§ 718.305 - 718.306 are inapplicable such that these methods of demonstrating pneumoconiosis will not be discussed further.

[4] A"B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). A designation of "Board-certified" (BCR) denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. An "A-reader" is a physician, but not necessarily a radiologist, who submitted six x-ray studies of his or her clients to ALOSH of which two studies are interpreted as positive for the existence of pneumoconiosis, two studies are negative, and two studies demonstrate complicated pneumoconiosis.

[5] A "--" under the *Reading* column of the chart indicates that the physician did not provide a specific category reading under the ILO-U/C classification system. 20 C.F.R. §§ 718.102 and 718.202(a)(1) (2001).

Exhibit / Physician/ Radiological Qualifications	*Date of study/ Date of reading*	*Film Quality*	*Reading*
Dx. 141 Albers unknown	04-04-02 04-04-02	Readable	--; 2 cm lesion n left lung base
Dx. 141 Albers unknown	04-08-02 04-08-02	Readable	--; extensive infiltrates in right upper lung; when compared to 4-4-02 study "there has been significant progression of infiltrative changes"
Dx. 141 Nelson radiologist	04-11-02 04-11-02	Readable	--; 2.5 cm nodule in left lower lung; large infiltrate in right upper lung
Dx. 141 Nelson radiologist	04-14-02 04-14-02	Readable	--; 2.5 cm nodule in left lower lung; "tiny nodule" in left upper lung
Dx. 141 Nelson radiologist	04-18-02 04-18-02	Readable	--; slight improvement in right upper lung infiltrate; nodules in left lower lung and right upper lung stable
Dx. 141 Hocott radiologist	05-07-02 05-07-02	Readable	--; compared with 04-18-02 study; stable dense nodule in left lower lung; rounded mass-like appearance in right upper lung with improvement in surrounding infiltrates
Dx. 141 Pascual radiologist	11-02-03 11-02-03	Readable	--; no active infiltrate or pleural effusion
Dx. 141 Smith radiologist	11-27-03 11-27-03	Readable	--; no acute cardiopulmonary process

Based on the foregoing (including chest x-ray evidence listed in Judge Wood's *Decision*), the miner has not established that he suffers from simple or complicated coal workers' pneumoconiosis under § 718.202(a)(1) (2004).

Simple coal workers' pneumoconiosis (chest x-ray)

With regard to the presence of simple coal workers' pneumoconiosis, the Board and circuit court upheld Judge Amery's determination that the chest x-ray evidence before him did not reveal the presence of coal workers' pneumoconiosis. The Board also upheld Judge Wood's finding of no clinical pneumoconiosis based on the chest x-ray evidence before her. With regard

to the more recent evidence, none of the studies, dated April 2002, May 2002, and November 2003, produced evidence of simple coal workers' pneumoconiosis according to the Board-certified radiologists interpreting them. On balance, the chest x-ray evidence does not support a finding of pneumoconiosis under § 718.202(a)(1) of the regulations.

Complicated coal workers' pneumoconiosis (chest x-ray)

It is undisputed from the chest x-ray interpretations that the miner has a mass in his left lower lung. In 1989, the mass measured approximately 2 centimeters in diameter and, by 2002, it measured 2.5 centimeters in diameter. Judge Amery also noted that the chest x-ray studies in the record before him revealed the presence of a nodule or mass in the left lower lung. None of the physicians' interpretations before Judge Amery diagnosed the presence of a size A or greater opacity. Rather, around 1998, physicians noted the presence of a developing mass in the miner's left upper lung.

Only Dr. Navani, in his interpretation of the November 1999 study, diagnosed a size A opacity, which qualifies as a finding of complicated pneumoconiosis under the regulations. The Board's decision in *Cooper v. Westmoreland Coal Co.,* BRB No. 04-0589 BLA (Mar. 28, 2005) (unpub.), a copy of which is attached, provides some guidance in weighing x-ray interpretations to assess the presence of complicated coal workers' pneumoconiosis.

In *Cooper,* the Board cited to *Lester v. Director, OWCP,* 993 F.2d 1143 (4th Cir. 1993) and stated that Claimant "bears the burden of establishing that the large opacities are caused by dust exposure in coal mine employment rather than the employer being required to prove that the opacities are due to a specific non-coal dust related source." However, the Board concluded that, under *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250 (4th Cir. 2000), "in order to resolve conflicting x-ray interpretations regarding the presence of complicated pneumoconiosis, the administrative law judge must assess the probative value of the x-ray readings in their entirety, rather than accepting them at face value." In this vein, the Board agreed with the administrative law judge that equivocal statements regarding etiology were not sufficient to outweigh the opinion of other physicians who concluded that the large opacity was coal dust related.

In this case, Dr. Navani diagnosed a size A opacity, which qualifies as a finding of complicated pneumoconiosis. However, as noted by Judge Wood, there is no probative medical opinion to support a finding that the mass is related to coal dust exposure and Dr. Navani provides no further reasoning in support of his finding.

In written reports regarding the May 1998 x-ray study, Dr. J.B. Ferrell noted the presence of a 2 to 2.5 cm nodule in the left lung that had been stable since 1994 and was likely benign. Dr. Repsher agrees that the mass appears to be benign since it had been stable in size for five and one-half years. Dr. Wiot opined that the lower lung mass "most likely represent(ed) hamartoma." The fact that the lower lung mass has been relatively stable in size for several years is inconsistent with the presence of progressively worsening disease process such as pneumoconiosis. This supports Dr. Wiot's assessment of the mass.

Dr. Ferrell also noted that a "[s]mall nodular (oblong) density (in the) left upper lobe with fibrotic response slightly less prominent on current study such that inflammatory etiology is favored over malignancy." Dr. Wiot noted that the oblong density "could represent an area of segmental collapse secondary to a central bronchial obstruction . . .." With regard to the April and May 2002 studies, the physicians noted "some improvement" in the right upper lung area. This indicates an acute, as opposed to chronic, disease process. Notably, one of the miner's treating physicians, Dr. Webb, stated in his May 2002 report that the upper lung mass had to be closely watched because it was in the location of the miner's pneumonia. An acute disease process, which demonstrates improvement over time, is inconsistent with the presence of an irreversible coal dust induced disease.

In sum, a preponderance of the evidence demonstrates that the lower lung mass is stable in size and the upper lung mass has improved somewhat over time. Neither of these characteristics is consistent with a progressive and irreversible coal dust induced disease process. Dr. Wiot possesses superior radiological qualifications on this record. Indeed, he developed the ILO-U/C system of classifying x-ray studies for the presence or absence of pneumoconiosis. His conclusion that the masses in the miner's lung are not coal dust related is persuasive and Claimant has not invoked the presumption contained at § 725.304 of the regulations.

Medical opinion evidence regarding existence of pneumoconiosis

The final method by which Claimant may establish that he suffers from the disease is by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. *See Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields, supra*. Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports which support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. *Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988). The medical opinions summarized in Judge Wood's 2002 *Decision* are incorporated by reference and the following additional medical reports were admitted as evidence in the record:

1. *Treatment and hospitalization records*. There are treatment notes and hospitalization data from the Eastern Oklahoma Medical Center and the Saint Edward Mercy Medical Center dating from 1977 to 2004. *Dx*. 141.

The earliest treatment notes, dated January 1977, indicate that the miner was treated for sinusitis and it was recommended that he be tested for tuberculosis because he and his wife were living with an elderly lady who had tested positive for the disease.

Dr. R.B. Winters has served as the miner's treating physician. On December 27, 1993, Claimant was examined by Dr. Winters for increasing shortness of breath. In his report, Dr. Winters noted that Claimant was an alcoholic and that he smoked two packs of cigarettes per day. He stated that the miner was "having trouble breathing when he tried to exert himself at all." Examination of the lungs revealed a "few rhonchi." A chest x-ray demonstrated a "coin lesion" that was unchanged from 1987 and was "probably benign." He further stated that the x-ray exhibited evidence of emphysema. Dr. Winters diagnosed chronic obstructive pulmonary disease of increasing severity, a benign coin lesion in the left lung, chronic alcoholism, and a chronic smoking habit.

In his notes dated April 18, 1994, Dr. Winters reported that the miner continued to smoke one-half a pack of cigarettes per day and continued to drink alcohol. Examination of the lungs revealed "rhonchi scattered over all lung fields."

His notes also indicate that Claimant was admitted to the hospital on April 5, 2002 for increased shortness of breath. Dr. Winters noted a "history of black lung" and that Claimant continued to smoke one-half to one pack of cigarettes per day. Examination of the lungs revealed decreased air movement and wheezing. A chest x-ray revealed a right lung neoplasm and chronic obstructive pulmonary disease. At the time of the miner's discharge on April 7, 2002, Dr. Winters diagnosed exacerbation of his chronic obstructive pulmonary disease, questionable early pneumonia, a right lung mass that continued to be suspicious for neoplasm, and hyponatremia, which was resolved with fluid restriction.

A CT-scan dated April 5, 2002 was interpreted by Dr. David G. Albers as revealing a 1.8 centimeter density in the left lung that was "definitely" not calcified. He identified no hilar or mediastinal mass lesions. Dr. Albers recommended that a biopsy be conducted.

On April 8, 2002, Claimant was admitted to St. Edward Mercy Medical Center under the care of Dr. William Webb for "worsening pneumonia." Dr. Webb noted that the April 5, 2002 CT-scan revealed an infiltrate in the right upper lung as well as a left lower lung nodule. Dr. Webb further reported a history of black lung disease as well as a history of smoking one-half a pack of cigarettes for "many years." Dr. Webb found that Claimant could "walk maybe 100 feet without stopping to catch his breath." He also stated that the miner complained of a daily cough and some recent wheezing. Examination of the lungs revealed "[r]honchi particularly on the right." In his April 22, 2002 discharge report Dr. Webb concluded that Claimant suffered from pneumonia of the right upper lung of unknown etiology, chronic obstructive pulmonary disease, and that Claimant had an abnormal chest x-ray, which revealed a nodule in his left lower lung.

A follow-up examination was conducted by Dr. Webb on May 7, 2002 to assess the miner's severe pneumonia. Dr. Webb reported that the miner suffered from "black lung" He further noted that the left lower lung nodule demonstrated on the chest x-ray had been present since 1986 or earlier. Dr. Webb stated that the activity in the miner's right upper lung would have to be followed closely because it was the location of the miner's pneumonia. Examination of the lungs revealed "diminished breath sounds bilaterally." Dr. Webb noted that Claimant had quit smoking since leaving the hospital in April of 2002.

During the follow-up examination on May 7, 2002, Dr. Jack L. Magness, Jr. conducted a biopsy. By report dated May 10, 2002, he diagnosed Claimant with "basal cell epithelioma."

Dr. Harold Blankenship treated the miner at the hospital on November 2, 2003 for complaints of hematemesis. Dr. Blankenship noted a history of aspirin abuse, alcohol abuse (Claimant drank 12 beers per day), and a "100 + pack year history of tobacco abuse" where the miner quit two years ago. He noted that Claimant experienced exertional dyspnea. Examination of the lungs revealed decreased breath sounds that were "clear to auscultation bilaterally without any adventitial sounds heard." Dr. Blankenship diagnosed gastrointestinal bleeding, chronic aspirin use, alcohol abuse, emphysematous chronic obstructive pulmonary disease, black lung, history of hypertension, remote long-term tobacco abuse, and congestive heart failure by history. Because of uncontrolled upper gastrointestinal bleeding, Claimant was transferred to the St. Edward Mercy Medical Center on November 2, 2003 by ambulance.

Dr. Dale Asbury treated Claimant while he was at St. Edward. *Ex.* 1. He noted a history of black lung, chronic obstructive pulmonary disease, tobacco abuse, nocturnal chest pain, gastroesophagel reflux disease, and dyspepsia. Dr. Asbury reported that the miner quit smoking two years ago, but "smoked heavily before that time and drinks a 12 pack of beer a day." Dr. Asbury diagnosed erosive esophagitis Grade D, and chronic obstructive pulmonary disease. Claimant was strongly encouraged to quit all forms of "alcohol forever" and "quit chewing tobacco forever."

On November 27, 2003, Claimant was admitted to the emergency room for increasing shortness of breath and a non-productive cough. Dr. Winters noted the miner's long-standing history of chronic obstructive pulmonary disease. He noted "[d]iffuse inspiratory and expiratory wheezes (that) just minimally improved with updraft." Dr. Winters diagnosed acute exacerbation of chronic obstructive pulmonary disease, recent gastrointestinal bleeding, and a history of hypertension among other conditions. When the miner was discharged on November 29, 2003, Dr. Winters diagnosed the same conditions, but noted that the miner's chronic obstructive pulmonary disease had improved and that he lungs were clear and without wheezing on examination.

2. *Deposition testimony of Dr. Joseph J. Renn III.* Dr. Renn was deposed on April 21, 2005. *Ex.* 2. He is board-certified in internal medicine, pulmonary diseases, and forensic medicine. *Ex.* 2 at 1. He is also a forensic examiner and B-reader. *Ex.* 2 at 1.

Dr. Renn had examined the miner on December 26, 2001 in conjunction with a previously filed claim and the opinions expressed in his deposition testimony were based on that examination as well as a review of certain medical records, including the miner's recent hospitalization and treatment records. *Ex.* 2 at 11. As an initial matter, Dr. Renn acknowledged that he understood the definitions of clinical and legal pneumoconiosis under the regulations. *Ex.* 2 at 13-15. He stated that the definition includes chronic obstructive pulmonary disease and that pneumoconiosis can be progressive and latent. *Ex.* 2 at 13-15. Upon review of the medical data, Dr. Renn concluded the following:

> Mr. Mann had pulmonary emphysema as a result of tobacco smoking. I found that he had a left lower lobe stable nodule, likely a granuloma. He had a moderately severe obstructive ventilatory defect.
>
> He has atherosclerotic coronary vascular disease demonstrated by chest pain known as angina pectoris and also abnormal electrocardiograms. He has high blood pressure known as systemic hypertension. He has a hyperlipidemia which is a Type 4.
>
> There is a combined cholesterol and triglyceride elevation; alcoholism and arthritis known as degenerative joint disease and, in the new records that I have reviewed since the independent medical review of December 26, 2001, he had a seizure disorder as of February '99.
>
> He's had pneumonia since then. He's had gastrointestinal bleeding which has been thought to be a result of chronic aspirin use and also alcoholism. He's also had congestive heart failure, a cellulites on his left wrist, bilateral cataract extractions and examinations of his upper gastrointestinal tract known as an EGD on November 2 and 3, 2003.

Ex. 2 at 19-20. He reported that the EKGs of record revealed the presence of heart disease. *Ex.* 2 at 28. Valid pulmonary function testing demonstrated an impairment that has progressed to moderate severity. *Ex.* 2 at 31. Dr. Renn stated that none of the foregoing conditions was related to coal dust exposure. *Ex.* 2 at 20.

Dr. Renn disagreed with Dr. Navani's chest x-ray interpretation. *Ex.* 2 at 22. He noted that Dr. Navani found irregularly-shaped, not rounded, opacities which is not indicative of coal workers' pneumoconiosis. *Ex.* 2 at 22. He also opined that simple coal workers' pneumoconiosis first appears in the right upper lobe of the lung, not the lower lobes as in this case. *Ex.* 2 at 21. Moreover, the lesion in the left lower lobe, which Dr. Navani classified as a size A opacity, was not complicated pneumoconiosis. *Ex.* 2 at 22. Rather, Dr. Renn noted that complicated pneumoconiosis does not occur in the lower lobes of a miner's lung and that "with his history of a grandmother that had tuberculosis it is likely old tuberculoma or a granulomatous disease such as tuberculoma." *Ex.* 2 at 21-22. He further found that the lesion was stable, which did not support a finding of a progressive disease process like complicated pneumoconiosis. *Ex.* 2 at 22.

Dr. Renn stated that, based on pulmonary function testing, the miner is totally disabled from performing the heavy manual labor of his last coal mining job. *Ex.* 2 at 23. He noted that Claimant's "FEV1 would preclude him from being able to do heavy manual labor and his diffusing capacity is low to the extent that he would be expected to have exercise-induced hypoxemia." *Ex.* 2 at 23. Dr. Renn opined that the cause of the reduced FEV1 and diffusing capacity was tobacco-induced emphysema. *Ex.* 2 at 23-24. He explained that "a person with pulmonary emphysema and (who) continued to smoke, their FEV1 will decline at the rate of approximately 120 milliliters per year, so he would have had a fairly rapid decrease in his ventilatory function because of continued tobacco smoking once he had developed the

pulmonary emphysema." *Ex.* 2 at 32. In this vein, he noted that the medical records indicated varying smoking histories, from 21 to 84 pack years. *Ex.* 2 at 24. In more recent records that he reviewed, Dr. Renn noted that the miner "had over a 100-pack year tobacco smoking history before he quit in 2001." *Ex.* 2 at 24.

Dr. Renn concluded that smoking has caused the miner to develop emphysema, atherosclerotic coronary vascular disease, and atherosclerotic peripheral vascular disease. *Ex.* 2 at 24. He acknowledged that coal dust exposure and smoking can each cause an obstructive impairment, but he found Claimant's impairment in this case to be due solely to smoking for the following reasons. *Ex.* 2 at 38. First, coal workers' pneumoconiosis causes exertional dyspnea whereas tobacco-induced emphysema causes the exertional wheezing noted in this case. *Ex.* 2 at 38. Second, Claimant has a non-productive cough "which occurs in people with pulmonary emphysema and who have a bronchospastic component, but it does not occur in coal workers' pneumoconiosis . . .." *Ex.* 2 at 38. Dr. Renn stated that, in those cases where coal workers' pneumoconiosis or industrial bronchitis is present, the miner will have a productive cough. *Ex.* 2 at 38. Third, in some cases of simple coal workers' pneumoconiosis, the miner will have bibasilar late inspiratory crackles, which Claimant did not exhibit in this case. *Ex.* 2 at 38. On the other hand, if a person suffers from tobacco-induced obstructive airway disease, as in this case:

> . . . you would have the hyperresonance, the diminished breath sounds, the rhonchi, the expiratory wheezes and diminished chest excursion because of hyperinflation from the pulmonary emphysema.

Ex. 2 at 38.

Fourth, Dr. Renn stated that coal workers' pneumoconiosis causes a *proportionate* reduction of volumes and flows on ventilatory testing whereas tobacco-induced emphysema causes a *disproportionate* reduction of volumes and flows, which is consistent with valid ventilatory data in this claim. *Ex.* 2 at 38-39. Fifth, the miner's diffusing capacity was reduced by 43 percent in November 1999, which is consistent with a tobacco-induced lung disease. *Ex.* 2 at 39. Dr. Renn explained that coal workers' pneumoconiosis causes a reduction of "no greater than 10 to 13 percent of the predicted value." *Ex.* 2 at 39. Sixth, Dr. Renn noted that the chest x-rays revealed pulmonary emphysema due to tobacco smoke whereas focal emphysema from coal workers' pneumoconiosis does not appear on chest x-rays. *Ex.* 2 at 39-40. Finally, Dr. Renn found no CT-scan evidence of coal workers' pneumoconiosis. *Ex.* 2 at 40.

Dr. Renn concluded that the miner did not suffer from legal or clinical coal workers' pneumoconiosis. *Ex.* 2 at 41.

On cross-examination, Dr. Renn stated that he did not believe that emphysema occurred more frequently in miners than non-miners. *Ex.* 2 at 44. He stated that "[t]he largest cause of emphysema in the entire United States and, indeed, in the world is tobacco smoking." *Ex.* 2 at 44. Dr. Renn did agree that, when Claimant started working in the mines in 1947, he was exposed to more "gas and everything" than the miners are today. *Ex.* 2 at 44.

In his *Decision*, Judge Amery concluded that the miner demonstrated the presence of legal coal workers' pneumoconiosis through the medical opinion evidence and this finding was upheld on appeal by the Board and circuit court. Judge Amery weighed the evidence as follows:

> . . . I find that Drs. Bradley, Nichols, and White thought the Claimant has pneumoconiosis, and Drs. Cook and Winters diagnosed COPD which could be related to the Claimant's coal mine employment . . . and this is not inconsistent with the definition of pneumoconiosis found in 20 C.F.R. 718.201. On the other hand, Drs. Pillstrom, Repsher, and Wiot thought the Claimant does not have pneumoconiosis. However, Drs. Repsher and Wiot never examined the Claimant and for that reason I give less weight to their opinions. Under these circumstances, I find that the weight of the evidence indicates that the Claimant has established the presence of pneumoconiosis by medical opinion evidence under 20 CFR 718.202(a)(4).

Judge Wood found, to the contrary, that the medical opinion evidence did not support a finding of coal workers' pneumoconiosis. Her determination was based on close scrutiny of the medical opinions considered by Judge Amery in light of more recent examinations and testing submitted as evidence before her. Judge Wood's *Decision* reflects an accurate and proper weighing of the medical opinion evidence and her findings are supported by the evidence.

Discussion of medical opinion evidence

With regard to medical evidence submitted before the undersigned Administrative Law Judge, it is noted that the miner's recent treatment and hospitalization records contain notations of "black lung." However, these findings appear to be based on a history obtained from the miner as opposed to medical data and, therefore, the opinions are neither well-documented nor well-reasoned. While these records also contain findings of chronic obstructive pulmonary disease and emphysema, the physicians do not specifically state that the conditions are attributable to coal dust exposure. As a result, these diagnoses do not fall within the definition of legal pneumoconiosis under the regulations.

In his 2005 deposition, Dr. Renn offered additional medical support for Judge Wood's determinations that the miner suffers from a totally disabling respiratory impairment, but does not have coal workers' pneumoconiosis. Dr. Renn's deposition testimony is probative because it is based on an earlier examination of Claimant as well as a comprehensive review of the medical records in this claim, including the miner's recent hospitalization and treatment records. Dr. Renn concludes that the miner suffers from disabling chronic obstructive pulmonary disease and emphysema arising from long-term tobacco abuse. He explained that a smoker with pulmonary emphysema will experience a decline in the FEV1 at a rate of 120 milliliters per year "so (the miner) would have had a fairly rapid decrease in ventilatory function because of continued tobacco smoking once he had developed the pulmonary emphysema." Further, Dr. Renn noted that the miner usually had a non-productive cough, which is typical of smoking-induced emphysema with a bronchospastic component. He also opined that smoking-induced emphysema causes hyperinflation of the chest which, in turn, produces the exertional wheezing and diminished breath sounds observed in Claimant. Finally, Dr. Renn stated that coal workers'

pneumoconiosis will cause a *proportionate* reduction of volumes and flows on ventilatory testing. However, the miner in this claim demonstrated a *disproportionate* reduction, which is consistent with findings of emphysema caused by smoking.

In sum, Judge Wood's finding that the miner does not suffer from legal or clinical coal workers' pneumoconiosis was well-reasoned and supported by the record before her. The hospitalization and treatment records consistitute an insufficient basis upon which to find that Judge Wood's *Decision* was erroneous or that the miner's condition has changed since that time. Indeed, Dr. Renn's subsequent deposition testimony further supports Judge Wood's determination. As a result, Claimant has not established the presence of coal workers' pneumoconiosis under § 718.202 of the regulations.

Total Disability Due To Pneumoconiosis

Benefits are provided under the Act for, or on behalf of, miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a) (2001). The regulations further state the following:

> For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

20 C.F.R. § 718.204(a) (2001).

Moreover, pneumoconiosis must be a "substantially contributing cause" to the miner's total disability. 20 C.F.R. § 718.204(c)(1) (2001). The regulations define "substantially contributing cause" as follows:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1) (2001).

Twenty C.F.R. § 718.204(b) (2001) provides the following five methods to establish total disability: (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3)

evidence of cor pulmonale with right-sided congestive heart failure;[6] (4) reasoned medical opinions; and (5) lay testimony.[7]

Total disability may be established through a preponderance of qualifying pulmonary function studies. The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 (2001) and require, in relevant part, that (1) each study be accompanied by three tracings, *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984), (2) the reported FEV1 and FVC or MVV values constitute the best efforts of three trials, and, (3) for claims filed after January 19, 2001, a flow-volume loop must be provided. To be qualifying, the regulations provide that the FEV1 and either the MVV or FVC values must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height. Pulmonary function study evidence contained in Judge Wood's 2002 *Decision* is incorporated by reference. There were no subsequent ventilatory tests submitted. Notably, however, Dr. Renn stated that the November 1, 1999 study was valid during his deposition. *Ex.* 2 at 29-30. This study yielded qualifying values and Dr. Renn's validation of the study lends further support to Judge Wood's finding of a totally disabling respiratory impairment under § 718.204(b)(2) of the regulations.

This study, which Dr. Renn concluded was valid, yielded qualifying values under § 718.204(b) of the regulations. It further supports Judge Wood's finding of a totally disabling respiratory impairment based on ventilatory testing.

Total disability may also be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2) (2001). In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found at the table at Appendix C. Blood gas study evidence set forth in Judge Wood's 2002 *Decision* is incorporated by reference. The following additional blood gas studies are in the record:

Exhibit/ Date of Test	***Physician***	***Altitude (feet)***	***Resting (R) Exercise (E)***	***PCO2***	***PO2***	***Qualifies?***
Dx. 141 04-04-02	Winters (hospital)	0-2,999	R	26.1	75.3	No Dr. Renn questioned the reliability of a study conducted during the miner's hospitalization (*Ex.* 2 at 35-36).

[6] There is no evidence of cor pulmonale with right-sided congestive heart failure such that this method of establishing total disability will not be discussed further.

[7] The Board holds that a judge cannot rely solely upon lay evidence to find total disability in a living miner's claim. *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

Dx. 141 04-08-02	Winters (hospital-day of discharge)	0-2,999	R	34.1	96.3	No Dr. Renn questioned the reliability of a study conducted during the miner's hospitalization (*Ex.* 2 at 35-36).
Dx. 141 11-27-03	Winters (emergency room)	0-2,999	R	29.7	62.6	Yes Dr. Renn questioned the reliability of a study conducted during the miner's hospitalization (*Ex.* 2 at 35-36).

The blood gas testing presented to Judge Wood revealed inconsistent results such that Judge Wood found that the tests did not "support or disprove total disability." On modification, blood gas studies conducted in 2002 produced non-qualifying values whereas the 2003 study was qualifying. However, Dr. Renn questioned the validity of all of the test results because the studies were conducted while the miner was hospitalized. Reliability of the qualifying 2003 test is particularly questionable since the test was conducted when the miner was admitted into the emergency room. Thus, Judge Wood's determination that the blood gas study evidence does not "support or disprove total disability" remains supported by the evidence of record.

The final method by which Claimant may establish total disability is through medical opinion evidence wherein a physician has exercised reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques to conclude that the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable employment. 20 C.F.R. § 718.204(b)(4) (2001).

Initially, Claimant has the burden of establishing the exertional requirements of his usual coal mine employment. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989). Once a claimant establishes that he is unable to perform his usual coal mine employment, a *prima facie* case for total disability exists and the burden shifts to the party opposing entitlement to prove that the claimant is able to perform comparable and gainful work. *Taylor v. Evans and Grambrel Co.*, 12 B.L.R. 1-83, 1-87 (1988).

Claimant last worked as a foreman. He testified before Judge Amery that he was at a "dead run all day." Claimant worked 13 hour days and supervised other employees. His job also required some lifting. Based on this record, it is determined that Claimant performed moderate to heavy manual labor. Comparing the exertional requirements of his last coal mining job with the physical limitations demonstrated on this record, it is determined that Claimant has established that he is totally disabled under 20 C.F.R. § 718.204(b)(4) (2001) through a preponderance of the medical opinion evidence of record.

Judge Wood weighed the medical opinions admitted as evidence at the hearing before her and concluded that the opinions supported a finding that Claimant suffers from a totally disabling respiratory impairment. Her *Decision* contains an accurate and proper analysis of the evidence. On modification, Dr. Renn explained that the miner's low FEV1 levels would prevent the miner from engaging in his last coal mining job. Moreover, he noted that the miner exhibited a low diffusing capacity and suffered from hypoxemia on exercise. Dr. Renn's opinion further supports Judge Wood's determination.

In 2002, Judge Wood concluded that the miner had a totally disabling respiratory impairment, but did not suffer from coal workers' pneumoconiosis. Further review of the evidence admitted by Judge Wood as well as new evidence admitted on modification leads to the conclusion that Claimant has not established a mistake in a determination of fact in Judge Wood's *Decision* or change in medical condition since the date her *Decision* was issued. Accordingly,

ORDER

IT IS ORDERED that the claim for benefits filed by Bobby D. Mann is denied.

A

Thomas M. Burke
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.